No. 58823-1-I

81324-8

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

MARK MATTSON,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED

RCW 9.94A.728 requires the Department of Corrections (DOC) to determine an inmate's eligibility for release to community custody based upon an individualized assessment of the merits of the release plan submitted by the inmate. This Court has repeatedly concluded this statutory requirement does not permit DOC to exempt a class of individuals from eligibility for transfer to community custody. Based upon its policy that it will not approve any plan submitted by inmates who have had evaluations finding they meet the criteria to be found a sexually violent predator, DOC has refused Mark Mattson's proposed release plans, and stated "No community release plan will be safe enough." Does DOC's generalized policy exempting an otherwise eligible class of inmates from community custody violate RCW 9.94A.728?

B. SUMMARY OF CASE

Mr. Mattson was eligible for community custody in July 2005. DOC has refused to transfer Mr. Mattson to community custody based upon DOC policy 350.200 which provides:

> For those cases in which a forensic evaluation has been completed and an expert has concluded that the offender does meet the criteria for civil commitment as defined RCW 71.09.020, no proposed community

> release plan will be deemed sufficiently safe to ensure community protection.

Response of DOC, Exhibit 5, p.2. Mr. Mattson then filed the present Personal Restraint Petition (PRP).

C. ARGUMENT

MR. MATTSON IS UNLAWFULLY RESTRAINED AND IS ENTITLED TO RELIEF BY WAY OF A PERSONAL RESTRAINT PETITION

1. Mr. Mattson is unlawfully restrained. A person is entitled to relief by way of a PRP where the person is unlawfully restrained as defined in RAP 16.4. RAP 16.4(2) provides restraint is unlawful if:

> The . . . sentence or other order entered in a criminal proceedings . . . was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.

This Court has said "An inmate's interest in his earned early release credits is a limited, but protected liberty interest. Likewise the department's compliance with the requirements of a statute affecting his release is a protected liberty interest." In re the Personal Restraint Petition of Dutcher, 114 Wn.App. 755, 758, 60 P.3d 635 (2002). Thus, "a decision by the department that, in essence deprives an inmate of earned early release into community

custody is an unlawful restraint." In re the Personal Restraint Petition of Liptrap, 127 Wn.App. 463, 469, 111 P.3d 1227 (2005).

As set forth below, DOC has denied Mr. Mattson earned early release based upon a generalized DOC policy rather than based upon the individualized determination which both Dutcher and Liptrap as well as RCW 9.94A.728 require. Thus, Mr. Mattson is unlawfully restrained and entitled to relief by way of a personal restraint petition.

2. Mr. Mattson need not show prejudice has resulted from his unlawful restraint. RAP 16.4(d) limits relief via a PRP to those situations where there are inadequate alternative remedies available to the petitioner. In other contexts the reviewing court evaluates a PRP by finding either: (1) a petitioner raising a constitutional error demonstrates actual prejudice; or (2) a petitioner raising a nonconstitutional issue demonstrates the "error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Personal Restraint Petition of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

This threshold requirement for relief by way of a personal restraint petition does not apply where there is no alternative avenue of judicial review. In re the Personal Restraint Petition of

Cashaw, 123 Wn.2d 138, 149, 866 P.2d 8 (1994), see also, In re the Personal Restraint Petition of Mines, 146 Wn.2d 279, 288, 45 P.3d 535 (2002) (reaffirming Cashaw). In such circumstances the petitioner need only show the restraint is unlawful, i.e., that it violates the state or federal constitution or the laws of the State of Washington. Dutcher, 114 Wn.App. at 761 (citing inter alia, Mines, 146 Wn.2d at 290) Because he has shown his restraint is unlawful, Mr. Mattson need not show he suffered prejudice as a result of his unlawful restraint.

3. DOC's policy of refusing to approve any release plan submitted after an inmate has been evaluated and determined to be a candidate for a Sexually Violent Predator proceeding violates RCW 9.94A.728. RCW 9.94A.728 provides in relevant part:

> . . . .
>
> (2)(a) A person convicted of a sex offense . . . may become eligible, in accordance with a program developed by the department, for transfer to community custody status in lieu of earned release time pursuant to subsection (1) of this section;
>
> . . . .
>
> (c) The department shall, as a part of its program for release to the community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. All offenders with community placement or community custody terms eligible for release to community custody status in lieu of earned release

> shall provide an approved residence and living arrangement prior to release to the community;
>
> (d) The department may deny transfer to community custody status in lieu of earned release time pursuant to subsection (1) of this section if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety. The department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody or community placement . . . .

In both Dutcher and Liptrap this Court concluded this statutory process is to be carried out by way of an individualized assessment of release plans. In no uncertain terms the Court found that DOC could not as a matter of policy exempt a class of prisoners from the provisions of this statute.

> The legislature has required the department to make its early release decision based upon plans proposed by inmates and reviewed by the department, and has (we believe wisely) not authorized any exemption from this process simply because (End of Sentence Review Committee] believes the offender qualifies for a civil commitment hearing.

Dutcher, 114 Wn.App. at 765-66 (quoted in Liptrap, 127 Wn.App. at 472).

In Dutcher, DOC refused to investigate an inmates release plan based upon a DOC policy, 350.200, which refused community custody for inmates referred for commitment as sexually violent predators. 114 Wn.App at 757-58. This Court found the DOC policy which created the exemption violated the provisions of RCW 9.94A.728 as that statute requires "DOC to base its community custody eligibility decisions on the merits of the release plan." Dutcher, 114 Wn.App. at 762.

Liptrap followed on the reasoning of Dutcher and concluded DOC policy 350.200 deferring consideration of release plans pending a forensic evaluation was equally violative of RCW 9.94A.728 as it again sought to craft exceptions which the Legislature did not create. Liptrap, 127 Wn.App. at 463.

DOC has responded by amending policy 350.200 to provide that while it will allow submission of release plans, and will even investigate them, it will in no circumstances approve a release plan for inmates who have been evaluated and referred for sexually violent predator proceedings. Response of DOC, Exhibit 5, p.2. On the heals of two plain court decisions requiring individualized assessments of the merits of each release plan rather then generalized policies of denial, DOC has simply crafted yet another

unauthorized exemption; one that provides "no proposed community release plan will be deemed sufficiently safe to ensure community protection." To be sure, RCW 9.94A.728 has not been amended and still requires the decision to release an individual to community custody be based upon the merits of the inmate's release plan. DOC policy 350.200 continues to exempt a class of inmates, including Mr. Mattson, from community custody based on matters other than the merits of the offender's release plan contrary to RCW 9.94A.728(2)(d).

DOC contends that its new policy is consistent with the decisions of Dutcher and Liptrap because (1) it does not apply to inmates who have not been evaluated, and (2) DOC has "investigated" all addresses submitted. Response at 21-22. In light of policy 350.200, at best any investigation is a farce and certainly is not the merit based determination which RCW 9.94A.728, Liptrap, and Dutcher require. This is made clear by DOC's statement "No community release plan will be safe enough for an offender like Mr. Mattson." Response at 4.

In addition, Liptrap did not, as DOC cynically suggests, simply draw a line in the sand beyond which the requirement of an individualized assessment ended. Liptrap did not hold that

following the attainment of an evaluation the requirements of RCW 9.94A.728 ceased to apply. Instead, Liptrap concluded:

> If there is to be extended confinement for sex offenders based on their risk of reoffense, it must be accomplished within the constraints of due process, such as the initiation of a civil commitment proceeding.

127 Wn.App. at 463. Thus, if an evaluation is to allow extended confinement it must be within the context of a civil commitment proceeding and not merely a DOC policy crafted in violation of RCW 9.94A.728.

Here, while DOC apparently has an evaluation indicating Mr. Mattson meets the criteria for filing a sexually violent predator petition, Response at 20, DOC has yet to refer him and apparently has no intention of doing so until he reaches his maximum release date in 2008. Response at 21. Liptrap allows DOC two choices; refer Mr. Mattson for the filing of an SVP petition or release him.

In both Dutcher and Liptrap, DOC contended its policies were necessary to carry out its mandate of community safety, and the State repeats that mantra in the present case. See Response at 20. Yet Dutcher and Liptrap found a policy of refusing community custody to sex offenders actually undercut public safety as it ensured that a class of offenders, "who are among the most

likely to reoffend – will eventually arrive in the community without a comprehensive release plan and subject to little or no supervision" in direct contravention of the Legislative goal in enacting RCW 9.94A.728 Liptrap, 127 Wn.App. at 475. The exemption in the present case is no less a public-safety concern. As of 2005, commitment proceedings were initiated in the cases in no more than half the individuals referred as sexually violent predators. Id at n.7. Thus, there is the very real chance that individuals who have been denied community custody, will simply arrive in the community with no supervision.

Mr. Mattson is unlawfully restrained and is entitled to relief.

D. CONCLUSION

For the reasons set forth above, and in Mr. Mattson's prior briefing, this Court should grant his petition and instruct DOC to consider his release plan based upon its merits rather than policy 350.200.

Respectfully submitted this 31st day of January, 2007.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE THE P.R.P. OF MARK MATTSON STATE OF WASHINGTON, RESPONDENT, v. MARK MATTSON, PETITIONER.	)	COA NO. 58823-1-I

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 31ST DAY OF JANUARY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JANUARY, 2007.

X_____